

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
Telephone Number Portability)	
)	
July 3, 2003 Letter from John Muleta, Chief,)	
Wireless Telecommunications Bureau, to John)	
T. Scott, III, Vice President and Deputy General)	CC Docket No. 95-116
Counsel, Verizon Wireless, and Michael T.)	
Altschul, Senior Vice President, General)	
Counsel, Cellular Telecommunications &)	
Internet Association (DA 03-2190))	
_____)	

**REPLY TO THE OPPOSITION OF VERIZON WIRELESS TO THE PETITION FOR
DECLARATORY RULING OR, IN THE ALTERNATIVE,
APPLICATION FOR REVIEW**

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Dated: August 26, 2003

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I. INTRODUCTION

The Wireless Carrier Group¹ hereby submits this reply to the opposition of Verizon Wireless (“VZW”) to the Group’s petition for declaratory ruling or, in the alternative, application for review (the “Petition/Application”) of the captioned letter (“WTB Letter”).² In its Opposition, VZW urges the Commission to act quickly on the Petition/Application so that wireless local number portability (“LNP”) may proceed without delay.³ VZW argues that the

¹ The Wireless Carrier Group consists of ALLTEL Communications, Inc. (“ALLTEL”), AT&T Wireless Services, Inc. (“AT&T Wireless”), Cingular Wireless LLC (“Cingular”) and Nextel Communications, Inc., its subsidiaries and affiliates (“Nextel”).

² In the Petition/Application, the Wireless Carrier Group asks the Commission to clarify that the statement in the WTB Letter that wireless carriers may not delay the porting of a number for any reason “unrelated to validating a customer’s identity” constitutes the non-binding guidance of the Wireless Telecommunications Bureau (“WTB”). As demonstrated in the Petition/Application, the foregoing statement, if binding, would exceed the authority delegated to the WTB Chief, violate the Administrative Procedure Act, abrogate contracts without the requisite findings and create unsound public policy.

³ Although the Wireless Carrier Group agrees that the Commission should act quickly on this matter, AT&T Wireless observes that VZW’s expressed support for removing obstacles to wireless LNP is at odds with the behavior of its controlling parent which consistently has frustrated AT&T Wireless’ efforts to establish a porting relationship.

WTB Letter has established a binding new rule dictating that carriers may not impose any conditions on the porting-out process beyond the validation of the customer's identity. VZW further maintains that such action comports with APA requirements, does not unlawfully abrogate carrier contracts and would serve the public interest. As demonstrated below and in the Petition/Application, VZW's argument on each of these points fails.

II. ARGUMENT

A. If Binding, as VZW Contends, the WTB Letter Would Violate the Rulemaking Requirements of the APA

As demonstrated in the Petition/Application, the Commission to date has issued no rules regarding the implementation of wireless LNP.⁴ To promulgate such rules, the Commission must act through a formal notice and comment rulemaking as required under the APA.⁵ To date, the Commission has taken no such action.

In an attempt to side-step this fundamental procedural requirement, VZW argues that the WTB "simply interpreted the wireless LNP rule it is charged to administer and did not attempt to write a new rule or change existing rules."⁶ Not surprisingly, VZW does not actually cite to any "rule" in support of this claim. VZW's omission can be attributed to the fact that the only wireless LNP "rules" that exist are the provisions establishing the basic mandate that wireless carriers provide LNP.⁷ These elemental provisions cannot serve as the basis for an "interpretation" by the WTB that there is an absolute right to port numbers which prohibits carriers from imposing reasonable conditions on the porting process.⁸

⁴ Petition/Application at 4-6.

⁵ *See id.* at 12-15.

⁶ Verizon Opposition at 10.

⁷ *See* 47 C.F.R. §§ 52.23, 52.31.

⁸ This issue was raised for the first time in VZW's own *ex parte* letter filed in CC Docket

VZW alternatively argues that the APA’s notice and comment requirements have been satisfied through the proceeding addressing the most recent petition filed by the Cellular Telecommunications and Internet Association (“CTIA”) in CC Docket 95-116.⁹ Again, to date, the Commission has neither given notice that it is considering the adoption of wireless LNP implementation rules, or what those rules might be, nor asked for comment on such. Moreover, the record in the CTIA declaratory ruling proceeding cannot cure the APA infirmities that would invalidate rule-like treatment of the porting guidance in the WTB Letter. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (the “notice required by the APA . . . must disclose in detail the thinking that has animated the form of a proposed rule . . .”).

B. Contrary to VZW’s Arguments, the WTB’s Guidance Is Not Supported by Record Evidence and, if Binding, Would Unlawfully Abrogate Contracts.

If binding, the porting guidance in the WTB Letter would interfere with and abrogate existing provisions in customer contracts. However, a Commission decision to abrogate or compromise the enforcement of carriers’ contractual rights “must follow investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory, or preferential.”¹⁰ As demonstrated by the Wireless Carrier Group, the WTB Letter did not satisfy these requirements and therefore, if binding, the porting “directive” would be unlawful.

In its opposition, VZW discusses at length the fact that parties may not circumvent the Commission’s rules through inconsistent contract provisions and that the Commission has the authority to preempt such contract provisions.¹¹ The Wireless Carrier Group does not dispute

95-116. *Ex Parte* Letter of J. Scott (Verizon Wireless) to M. Dortch, FCC Secretary, CC Dkt. 95-116 (May 20, 2003).

⁹ Verizon Opposition at 14-15.

¹⁰ *MCI v. FCC*, 665 F.2d 1300, 1303 (D.C. Cir. 1981) (citation omitted).

¹¹ Verizon Opposition at 16-17.

these points. However, VZW's discussion is entirely inapplicable in the present context. The contract provisions at issue are not inconsistent with any Commission requirement because the Commission has not promulgated any wireless LNP implementation rules. Moreover, the Commission still must make adequate findings before abrogating "inconsistent" contract provisions and there have been no such findings in this case.¹²

VZW further maintains that the abrogation issue only is relevant to Cingular's contracts because only they expressly condition the port when the customer's account is in arrears. Although Cingular's contract provisions present the most obvious case, the porting guidance implicates less explicit provisions in the contracts of other members of the Wireless Carrier Group. For example, Nextel's contract defines the service provided in broad terms, encompassing the range of telephone, data and information services. The contract further provides in part that in the event of nonpayment, Nextel may temporarily or permanently terminate its "service." The WTB's porting guidance, if binding, would abrogate these provisions and force Nextel to provide a customer the porting component of its service despite non-payment. Moreover, the guidance would interfere with the inter-relationship of various other contract terms, such as those regarding minimum contract terms, early termination fees and credit requirements, that is critical to the viability of wireless carriers' service offerings.¹³

C. The Imposition of Reasonable, Business-Related Conditions on the Porting-Out Process Serves the Public Interest and Would Not Result in the Parade of Horribles Envisioned by VZW.

The relief requested in the Petition/Application is very narrow: clarification that carriers may impose reasonable, business-related conditions on the porting process, such as requiring

¹² See Petition/Application at 16-18.

¹³ *Id.* at 17-18.

payment of past due amounts prior to the port. VZW argues that this relief will “gut” the effectiveness of LNP by allowing carriers to delay ports for months until roaming charges are posted and to erect other barriers to LNP.¹⁴ On the contrary, such a clarification will recognize the interdependence of provisions in wireless service plans and allow carriers to continue to offer benefits valued by consumers, such as subsidized handsets.¹⁵ If a carrier engages in abusive practices related to conditions on porting, the Commission can address that problem on an individual complaint basis.

III. CONCLUSION

As demonstrated above, the arguments presented in VZW’s opposition are without merit. The Wireless Carrier Group respectfully requests that the Commission grant the relief requested in its petition for declaratory ruling or, in the alternative, application for review of the WTB Letter.

Respectfully submitted,

By: /s/ Suzanne Toller

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Dated: August 26, 2003

¹⁴ When considering VZW’s arguments regarding the need for an absolute right to port numbers, the Commission should remain aware of VZW’s history on wireless LNP issues. Until recently, VZW adamantly has opposed wireless LNP, spearheading the court challenges to the Commission’s LNP mandate. Indeed, its pleadings are replete with strident claims that LNP is not needed to protect consumers and would not serve the public interest. *See, e.g.,* Final Brief for Petitioners at 22-28, *CTIA and Verizon Wireless v. FCC* (D.C. Cir.) (No. 02-1264). VZW’s recent about-face on wireless LNP raises doubts regarding its credibility on these issues.

¹⁵ Petition/Application at 20-21.

CERTIFICATE OF SERVICE

I, Ellena Soto-Baros, of Davis Wright Tremaine, LLP, One Embarcadero Center, Suite 600, San Francisco, CA 94111, do hereby certify that I caused to be served a copy of the foregoing Reply to the Opposition of Verizon Wireless to the Petition for Declaratory Ruling or, in the Alternative, Application for Review of the Wireless Carrier Group on this 26th day of August, 2003, via First Class U.S. mail to the parties listed below.

/s/ Ellena Soto-Baros

Ellena Soto-Baros

August 26, 2003

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